BANK OF COMMERCE BHD

v.

SAM LIM FONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN JAKA J
[SUIT NO: D3-22-958-1993]
30 DECEMBER 1998

CONTRACT: *Guarantee - Separate letters of guarantee - Whether construed as and amounted to a joint and several guarantee - Whether there was intention to execute a single guarantee*

CONTRACT: *Damages - Quantum - Account showing amount claimed - Whether accurate - Whether evidence adduced to the contrary*

In this case, the 1st and 2nd defendants were at the material time directors of Egret Industries Co (M) Sdn Bhd ('the company'). The 1st and 2nd defendants together with the 3rd and 4th defendants jointly and severally agreed to become guarantors for the company and had executed separate letters of guarantee in favour of the plaintiff, in consideration of various loan facilities granted to the company by the plaintiff. Upon default of the company in repaying the loan facilities, the plaintiff appointed receivers and managers over the assets of the company and thereafter commenced the action against all the defendants claiming the outstanding amounts with interests.

The plaintiff's claim against the 4th defendant was struck off as the writ had expired. The claim against the 3rd defendant was withdrawn. The trial herein only concerned with the plaintiff's claim against the 1st and 2nd defendants ('the defendants').

Two issues were raised in this case, *inter alia*, (a) whether the guarantees ('the guarantees') signed separately by the defendants could be construed as and amounted to a joint and several guarantee; and (b) whether the quantum of damages had been proved.

Held:

[1] To determine whether the guarantees were joint and several, two questions had to be considered: (1) whether on evidence it could be concluded that the two guarantees signed separately could be treated as one transaction; or (2) whether it could be shown that there was no intention that the defendants sign one guarantee or that such requirement be waived.

[2] It was apparent that the guarantees did not either expressly or impliedly refer to each other. There was no other evidence to show that they were related to one another. Therefore, the one transaction principle had no application.

[3] When the defendants executed separate guarantees, each of them was aware that others would also sign a separate guarantee. Thus, it was clear that there was no intention on the part of each of them to execute a single guarantee. Moreover, there was no evidence to show that they would not have executed the guarantees if they had known that the other guarantors had executed separate guarantees.

[4] On the strength of these separate guarantees, the loan was released to the company. The defendants, being the directors of the company, ought to have known that their obligations under the guarantees were joint and several. To accept their contention that the guarantee was null and void would be to deny justice to the plaintiff. Therefore, the guarantees executed separately by the defendants were enforceable as a joint and several guarantee.

[5] The defendants had not adduced any evidence to show that there was a manifest error or fraud in the recomputed statement of the account. As such, the amount claimed by the plaintiff was held to be accurate, and the defendants were liable thereunder.

[Judgment for the plaintiff.]

Case(s) referred to:

Chen Heng Ping @ Tian Seow Hock & 5 Ors v. Intradagang Merchant Bankers (M) Sdn Bhd [1995] 3 CLJ 690 ***(foll)***
Hansard v. Lethbridge & Ors [1892] TLR 346 ***(refd)***
Indian Bank v. Raja Suria [1993] 2 SLR 497 ***(dist)***
Keith Murphy Pty Limited v. Custom Credit Corporation Ltd [1992] 6 WAR 332 ***(refd)***

For the plaintiff - Ringo Low (Shamira with him); M/s Soo Thien Ming & Nashrah
For the 1st and 2nd defendants - Mohan; M/s Shook Lin & Bok

Reported by Farah Naim & Usha Thiagarajah

JUDGMENT

Arifin Jaka J:

On 1 September 1993 the Bank of Commerce (M) Bhd., formerly known as United Asian Bank Bhd. ("the plaintiff") filed this suit against all the four defendants herein praying for judgment against them as pleaded under para. 17 of the amended statement of claim as follows:

(a) Under the overdraft facility, for payment of the sum of RM307,313 owing as at 30 April 1993 with interest thereon at the rate of 12.25% per annum on daily rests calculated from 1 May 1993 until the date of full payment or realisation.

(b) Under the term loan facility for payment of the sum of RM1217,636.97 owing as at 30 April 1993 together with interest thereon at the rate of 12.25% per annum on daily rests calculated from 1 May 1993 until the date of full payment or realisation.

(c) Under the export credit refinancing and trust receipt facilities for payment of the sum of RM818,775.75 owing as at 30 April 1993 together with interest at the rate of 12.25% per annum on daily rests calculated on the principal sum of RM734,940.10 from 1 May 1993 until the date of full repayment or realisation.

(d) The costs of this action, and

(e) Such further and other relief as deem fit and proper by this Honourable Court.

The plaintiff's claim against the fourth defendant was struck off as the writ had expired. The claim against the third defendant was withdrawn. The trial herein only concerns the plaintiff's claim against the first and second defendants only (hereinafter collectively called "the defendants").

The facts are not really in dispute and are as follows. The first and second defendants were at the material time directors of Egret Industrial Co (M) Sdn Bhd ("Egret"). The defendants executed separate guarantees on 15 August 1990 in favour of the plaintiff. The guarantee executed by the first defendant is at p. 16AB and the one executed by the second defendant is at p. 12AB. The plaintiff's claim against both the defendants is based on these two instruments. It is not disputed that both the guarantees are in relation to various loan facilities granted to Egret by the plaintiff and the liability of both the defendants under the guarantees is limited to an amount of not exceeding RM5 million. Upon default by Egret in repaying the loan facilities the plaintiff appointed receivers and managers over the assets of Egret and thereafter commenced this action claiming the outstanding amount as pleaded under para. 17 of the amended statement of claim as stated earlier in this judgment.

The relevant parts of the claim against the defendants in the amended statement of claim is para. 12 which reads:

Paragraph 12

In consideration of the Total Banking Facilities extended by UAB to the Borrower, 1st, 2nd, 3rd and 4th defendants jointly and severally agreed to become guarantors for the Borrower and have executed the following letters of guarantee in favour of UAB:

(a) The 1st and 2nd defendants have each executed separate letters of guarantee dated 15 August 1990 and

(b) The 3rd and 4th defendants each have executed separate letters of guarantee dated 15 October 1990 (hereinafter collectively referred to as "the guarantee").

The relevant part of the defence reads:

4. Save that the 1st and 2nd defendants executed separate letters of guarantee dated 15 February 1990 ("the said guarantees") in favour of United Asian Bank ("UAB") the rest of para. 12 of the statement of claim is denied. The 1st and 2nd defendants contend that the said guarantees are not enforceable by the plaintiff herein as the plaintiff is not a party to the said guarantees.

7. The 1st and 2nd defendants contend and will contend at the trial of this action that the said guarantees are void/or unenforceable for want of consideration.

The defendants also deny that the amounts claimed by the plaintiff are due and owing to the plaintiff by the borrower i.e. Egret.

From the pleadings and the contentions of the parties it can be gathered that there are two issues raised in this case, which are:

(a) Whether the guarantees signed separately on 15 August 1990 by the defendants can be construed as and amount to a joint and several guarantee and

(b) Whether the quantum of damages has been proved.

I shall now proceed to consider these issues.

Issue (a) - Whether The Guarantees Are Joint And Several Guarantee

The defendants contend that the guarantees relied upon by the plaintiff cannot be construed and do not amount to a joint and several guarantee as the two guarantees signed separately by the defendants do not refer to each other and

that the guarantees do not identify the parties together with whom the joint obligation is being undertaken. The learned counsel for the defendants referred to the case of *Indian Bank v. Raja Suria* [1993] 2 SLR 497, a decision of the Singapore Court of Appeal where the court had to consider the effect of two separate guarantees executed by the guarantors in favour of a lending bank as a security for facilities granted by the bank to a borrower. In that case the lending bank ("the appellant") had granted an overdraft facility to a company called Westnapack (s) Pte Limited ("the company") which facility was to be secured, *inter alia*, by the personal guarantee of all seven directors of the company. The guarantee named all the seven directors who were required to sign the guarantee, as joint and several guarantors. However as it turned out to be only six directors signed the guarantee ("the first guarantee"). The seventh director signed at a later date a separate guarantee ("the second guarantee") which named only the seventh director as the guarantor.

The company was unable to settle the amount due under the facility as demanded and was subsequently wound up. The appellant then demanded payment from all the seven directors on the basis that they were jointly and severally liable under the first and second guarantee asserting that the first and second guarantee constituted one transaction. The claim was dismissed in the High Court and was confirmed on appeal to the Court of Appeal. It was contended by the appellant that the first and second guarantees were in fact agreed as one guarantee and they could be so treated. The court rejected this contention on the facts and circumstances of the case. At p. 503 Lai Kew Chai J (delivering the grounds of judgment of the court) said:

> ... to accept the bank's arguments would be to open a way around the long standing principle that all the co-sureties of a joint and several guarantee have to sign the guarantee unless it is shown that there was no such intention or that the requirement had been waived.

Further down on the same page His Lordship further said:

> In the end the appeal may be summerised as follows. The action by the bank was pleaded in para 3 of the amended statement of claim as based on the joint and several guarantee of the seven defendants as contained in the two documents. They therefore had to show that the two documents were in fact one guarantee. They were unable to do this because the guarantees did not refer to each other.

The learned counsel for the defendants also contended that the joint and several liability of guarantors in a guarantee is dependent on the execution of it by all persons named obligors. He referred to the Australian case of *Keith Murphy Pty Limited v. Custom Credit Corporation Ltd* [1992] 6 WAR 332. In that case it was held *inter alia*:

> As a rule of construction, where obligations are assumed jointly or jointly and severally, the contract is dependent on the execution of it by all persons named as obligors.

It is apparent from the two cases cited by counsel for the defendants that the defendants in the instant case would be bound by the guarantees which they had signed separately if the two guarantees could be read together as part of one transaction or if it can be shown that there is no intention that they were to sign one guarantee as co-sureties of a joint and several guarantee or that the requirement has been waived.

The first question to be answered therefore is whether on the evidence it can be concluded that the two guarantees signed by the defendants separately can be treated as one transaction. On close scrutiny of the guarantees it is apperent that the guarantees do not either expressly or impliedly refer to each other. There is no other evidence to show that these two guarantees are related to one another. I therefore find that the one transaction principle has no application in this case.

The second question which is related to the long standing principle that all the co-sureties of a joint and several guarantee have to sign the guarantee (*Indian Bank's* case) is whether it can be shown in the instant case that there was no intention that the defendants would sign one guarantee or that such requirement that the defendants were to sign one guarantee has been waived. I will now advert to the evidence in this case to see whether there was no such intention or that the requirement that the defendants were to sign one guarantee has been waived. The second defendant in his evidence said that he was not told at the time he signed the guarantee (see p. 12 AB) that the first defendant would not sign the same guarantee and that the first defendant would sign a separate guarantee. He also said that he was not given a copy of the guarantee. In cross-examination he said that he was aware that one of the conditions for the loan granted to the company was that the guarantors were to sign joint and several guarantee.

This is indeed evidenced by the letter of offer for the facilities addressed to Egret, the borrower (p. 7AB) which clearly stated all directors (which includes the defendants) were required to sign a joint and several guarantee. He also confirmed that he did not request to be supplied with a copy of the agreement which he signed.

The only witness for the plaintiff, Palagan a/l Manickam (SP1) its officer, in cross examination said in respect of the guarantee to the effect that each of the guarantors signed separate guarantee and that there is no record to show that the guarantees were given to the guarantors. He further said in cross examination that he disagreed with the suggestion of the defendants' counsel

that the guarantee was a separate guarantee and not a joint and several guarantees.

On the evidence I cannot accept the second defendant's contention that he did not know that the first defendant would not sign the same guarantee and that the first defendant would sign a seperate guarantee. I am satisfied that he knew that he and the first defendant would sign a separate guarantee. This is clearly so stated in the guarantee itself in the following form:

> ... either alone or jointly with any other person or persons I, Tey King ... jointly and severally guarantee...

At the time when each of the defendant signed the guarantee he was aware that other persons would also sign a separate guarantee. It is therefore clear that there was no intention the defendants would sign a single guarantee.

I therefore find that the two separate guarantees executed by defendants on 15 March 1990 amount to a joint and several obligations on the part of both defendants.

The *Indian Bank* case decided by the Singapore Court of Appeal is distinguishable on the facts. In that case the intention of the parties was that the seven directors had to sign on one contract of guarantee in which all the seven names of the guarantors appeared in the first guarantee. It was established by the evidence that two of the guarantors would not have signed the first guarantee if they knew that the seventh guarantor were to sign a separate guarantee which is the second guarantee. The intention of the parties there was that all seven directors would sign the first guarantee as joint and several guarantors.

In *Hansard v. Lethbridge & Ors* [1692] TLR 346 it was held that where a surety executes a document **in the belief derived from its form** (emphasis added) that it will be executed by all the sureties named therein as persons who are to sign, he will be relief of his obligation if all the others do not sign.

It is clear on the authorities of the *Indian Bank's* case and *Hansard's* case that a guarantor would be relieved of his obligation if the other guarantors whose name appeared in the document do not sign the document. In the instant case there is no evidence to show that either of the defendants would not have signed the guarantee separately if either of them knew that the other guarantors were to sign a separate guarantee. On the contrary, as what I had stated earlier the defendants knew the other guarantors would sign a separate guarantee. On the strength of these separate guarantees the loan was released to the Egret. The defendants being the directors of Egret at the material time ought to have

known that their obligations under the guarantee are joint and several. They cannot now be heard to say that they are not bound by the guarantee. To accept the defendants' contention that the guarantee was null and void under the circumstances and on the evidence in this case would be to deny justice to the plaintiff. Accordingly for the above reasons I hold that the guarantees signed separately by the defendants are enforceable as a joint and several guarantee.

Issue (b) - Quantum

SP1 in his evidence referred to P5 a copy of the recomputed statement of the account and confirmed the various amounts claimed by the plaintiff. The witness was not cross examined on this account. The statement of account is duly certified as required under cl. 14 of the guarantee the relevant part of which states:

> I/we agree that a copy of the account of the Principal contained in the Bank's book of account ... signed by the manager for the time being of the office at which such account shall be kept, or any office of the Bank, shall be conclusive evidence against me/us of the amount for the time being due to the Bank from the principal in any action or other proceeding brought against me/us upon this guarantee.

The question whether a conclusive evidence clause can be challenged is dealt with in *Chen Heng Ping @ Tian Seow Hock & 5 Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 AMR 1655 where the Court of Appeal held:

> Although guarantors are contractually precluded from requiring the bank to prove the accuracy of the Certificate, the guarantors are not prevented from adducing evidence to show that there is a manifest error, or fraud, on the face of the certificate.

The defendants had not adduced evidence to show that there is a manifest error or fraud in the recomputed account (P5).

Accordingly I accept P5 which shows that the amount claimed by the plaintiff is accurate.

On the above premises I therefore find that both defendants are liable under the guarantee. Both defendants are ordered to pay to the plaintiff as follows:

(a) the sum of RM1805,799.29 being the amount outstanding under the Term Loan Account as at 30 September 1997 together with interest at the rate of 12.25% per annum on daily rest on the principal sum of RM1,217,636.97 from 1 October 1997 until date of full and final payment;

(b) the sum of RM721,915.25 being the amount outstanding under the Trust Receipts & ECR Account as at 30 September 1997 with interest thereon at the rate of 12.25% per annum on daily rest on the principal sum of RM254,868.96 from 1 October 1997 to date of full and final payment and;

(c) the sum of RM94,832.49 being the amount outstanding under the overdraft account as at 30 September 1997 with interest thereon at the rate of 12.25% per annum on daily rest from 1 October 1997 until full and final payment;

(d) Cost of the action to the plaintiff to be taxed.